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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

JAMES W. FOWLER CO., an Oregon
company,

Plaintiff,

v.

QBE INSURANCE CORPORATION, a
foreign insurance company,

Defendant.

Case No.

COMPLAINT FOR
DECLARATORY JUDGMENT
AND BREACH OF CONTRACT

DEMAND FOR JURY TRIAL

Plaintiff James W. Fowler Co. through its undersigned attorneys, alleges as follows:

I. PARTIES

1. Plaintiff James W. Fowler Co. ("Fowler"), is an Oregon corporation with its principal place of business in Dallas, Polk County, Oregon.

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2. QBE Insurance Corporation (“QBEIC”) is a Pennsylvania insurance company that is authorized to do business in Oregon and does do business in Polk County, Oregon, and throughout the State of Oregon.

3. QBEIC sold Fowler a contract of insurance whereby QBEIC agreed to provide all-risk contractors’ equipment insurance for Fowler’s equipment that was being used on a construction project in North Dakota. QBEIC also provided other insurance coverages as well.

II. JURISDICTION & VENUE

4. This Court has personal jurisdiction over the parties because they transact business in Polk County, Oregon, and throughout the State of Oregon.

5. This Court has subject matter diversity jurisdiction pursuant to 28 U.S.C. § 1332 because Plaintiff and the Defendant are citizens of different states and the amount in controversy exceeds \$75,000.

6. Venue is proper in this Court under 28 U.S.C. § 1391 because the defendant resides in this judicial district and because Fowler maintains its principal place of business in this judicial district.

III. FACTS

8. **The Project.** In August 2013, Fowler entered into a contract with the North Dakota State Water Commission (“Water Commission”) for the Southwest Pipeline Project under Lake Sakakawea in Mercer County, North Dakota (the “Project” or “Southwest Pipeline Project”). The Project calls for the lake water to be piped to the shore and screened, where a water treatment plant operated by the Water Commission will supply potable water for both

domestic and livestock use in southwest North Dakota. The project required Fowler to construct a 151-foot-deep vertical launch shaft on the shore of Lake Sakakawea and install a 2,800-foot reinforced concrete intake pipeline.

9. Fowler used a micro-tunnel boring machine (“MTBM”) to tunnel horizontally under the lake to install the underground water intake pipeline. As the MTBM progressed, Fowler installed sections of concrete jacking pipe behind the MTBM to create the pipeline.

10. **Contractors’ Equipment Insurance.** Fowler purchased insurance from QBEIC to cover all of its equipment on the Project, including the MTBM. The contract of insurance was negotiated and acquired through Parker, Smith & Feek, which is a licensed insurance agent and broker and acted at all times on behalf of both Fowler and QBEIC.

11. QBEIC issued contractors’ equipment coverage, as part of a larger policy of inland marine coverage, under Policy No. QIM0098918 (“Policy”). This Policy had a policy period beginning on August 30, 2016 and ending on November 1, 2017. On February 2, 2017, the Policy was amended to insure the MTBM for \$2,206,947. A copy of the Policy is attached hereto as **Exhibit A**.

12. **The Pipe Occurrence.** On October 5, 2017, while Fowler was performing work on the Project, Fowler’s employees noticed that in the middle of the tunnel, a section of reinforced concrete jacking pipe was cracked and deformed such that the jacking pipe could no longer be pushed and the tunnel could not advance (hereinafter “Pipe Occurrence.”) The earth above the section of pipe unexpectedly moved or shifted and point-loaded or wedged the jacking pipe sections in place, preventing them and the rest of the tunnel from moving. Prior to the Pipe Occurrence, the MTBM had successfully tunneled through the area where the damaged pipe was

located. However, after the Pipe Occurrence, the MTBM could not progress forward, and could not be removed from the tunnel, rendering it useless and inoperable (hereinafter “MTBM Loss”).

13. **Claim Tendered to QBEIC.** On October 30, 2017, Fowler tendered the MTBM Loss claim to QBEIC. QBEIC provided a reservation of rights letter on March 8, 2018. A copy of that letter is attached hereto as **Exhibit B**. As part of QBEIC’s reservation of rights letter, QBEIC requested documentation to investigate the loss, which Fowler timely provided on or about March 28, 2018.

14. QBEIC issued an additional request for information related to potential salvage operations, which were never an option, and Fowler timely responded.

15. It has now been nearly a year since the loss, and QBEIC has failed to make a coverage determination.

16. **Insurance Policy.** At the time of loss, QBEIC provided contractors’ equipment insurance to Fowler for its equipment at the Southwest Pipeline Project pursuant to QBEIC Policy No. QIM0098918. A copy of the contractors’ equipment coverage portion of the Policy appears at Exhibit A, pages 60-74, (hereinafter “CE Policy”). The CE policy is an all-risk policy.

17. The CE Policy insures scheduled contractors’ equipment for all “risks of direct physical loss unless the loss is limited or caused by a peril that is excluded.” Exhibit A at 67. The MTBM was scheduled contractors’ equipment under the Policy. Exhibit A at 3.

18. The Policy limits the amount of coverage for the MTBM to \$2,206,947. Exhibit A at 3.

19. QBEIC has made no payments to Fowler, the insured under the Policy.

20. Parker, Smith & Feek has informed Fowler that QBEIC intends to deny coverage for the loss on the basis that there has been no “direct physical loss,” despite the fact that the MTBM has been rendered useless and inoperable, and cannot be salvaged.

IV. CAUSES OF ACTION

Declaratory Judgment

21. Each of the allegations above is incorporated herein by reference.

22. There is a clear and present dispute between Fowler, on the one hand, and QBEIC on the other, concerning contractual and statutory rights, obligations, and/or remedies concerning the coverage available (including whether certain limitations and exclusions apply) under the CE Policy for the MTMB Loss. Fowler is entitled to declaratory relief.

23. Pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, Fowler in good faith requests that the Court declare the following rights and obligations of the parties under the Policy:

- a. A declaration that QBEIC is liable to pay Fowler under the Policy for the MTBM Loss.
- b. A declaration that the MTBM Loss is direct physical loss;
- c. A declaration the Policy provides coverage for the MTBM Loss, up to the limits of the Policy for the MTBM, which is \$2,206,947;
- d. A declaration Fowler is entitled to immediate payment of the Actual Cash Value for the loss of the MTBM and is entitled to payment for the full cost of the repair and replacement of all lost and damaged property once Fowler incurs those costs.

Breach of Contract

24. Each of the allegations above is incorporated herein by reference.

25. The Policy requires QBEIC to adjust claims and pay covered claims. QBEIC has failed to adjust and pay Fowler's claim for almost a year since the loss. QBEIC has constructively and wrongly denied Fowler's claim and breached its contract with Fowler.

26. Fowler is entitled to all of its Policy benefits, including, but not limited to, payments for the amount to repair or replace the lost or damaged property.

27. Fowler is entitled to attorneys' fees and other costs and expenses pursuant to Oregon Revised Statutes 742.061, or as otherwise allowed by law.

V. PRAYER FOR RELIEF

1. A declaratory judgment stating the rights and obligations of the parties under the Policy as set forth in Section IV of this Complaint;

2. A monetary judgment for all damages arising from QBEIC's breach of contract;

3. An award of prejudgment and post-judgment interest as allowed by law;

4. An award of attorneys' fees and other costs and expenses pursuant to Oregon Revised Statutes 742.061, or as otherwise allowed by law; and

5. Such other and further relief as this Court deems just and proper.

VI. DEMAND FOR JURY TRIAL

Plaintiff requests a jury trial for all matters so triable pursuant to Fed. R. Civ. P. 38.

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DATED this 25th day of September, 2018, at Seattle, Washington.

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s/Larry Setchell

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